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In The

Supreme Court of the United States

October Term, 1995

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ANTHONY PIPOLA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether criminal liability for "using" and "carrying" a firearm, under 18 U.S.C. §924(c)(1), may be predicated on the defendant being merely an aider and abettor or co-conspirator of the person who used and carried the firearm, without proof that the defendant knew of the intended use or was present when the offense was committed?

2. Whether *Bailey v. United States,* 116 S.Ct. 501(1995), decided while this case was *sub judice,* before the United States Court of Appeals requires a remand to determine whether the district court's charge to the jury which failed to define "use" and "carry" was reversible error?

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ANTHONY PIPOLA,

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Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

Anthony Pipola petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The Court of Appeals' opinion is reported at 83 F.3d 5563 (2d Cir. 1996), reprinted herein at Appendix, pages 1a through 21a.

JURISDICTION

The Court of Appeals' opinion affirming the conviction was issued April 29, 1996. This Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment 5: "No person shall be.... deprived of life, liberty, or property without due process of law."

18 U.S.C. §924(c)(l):

> Whoever, during and in relation to any crime of violence .... (including a crime of violence .... which provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which he may be prosecuted in a court of the United States, uses or carries a firearm, shall, in addition to the punishment provided for such crime of violence be sentenced to imprisonment for five years .... Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person convicted of a

violation of this subsection, nor shall the term of imprisonment imposed under this subsection run concurrently with any other terms of imprisonment including that imposed for the crime of violence .... in which the firearm was used or carried.

STATEMENT OF THE CASE

This case presents two important issues of federal criminal law, which involve the implementation of an intervening decision rendered by this Court in *Bailey v. United States*, 116 S.Ct. 501 (1995), to cases on direct appeal at the time *Bailey* was decided.

A. An Overview Of The Alleged Offense

This case involved two separate conspiracies to commit armed robberies on September 21st and 26th 1992. The participants included the petitioner Anthony Pipola and his co-conspirators/accomplices James Loizzo, Steven Small, James Rogers, Dominick Martorella, Thomas Nocella, Mark Jacobowitz, Pat Caroleo and Tommy Donohue.[1] The petitioner was ultimately held accountable, not only for his role in planning and aiding

---

[1] Donohue, Nocello, and Martorella pleaded guilty while Jacobowitz and Caroleo were not indicted in this case. Virtually all of the government's proof was provided and presented at trial through the testimony of Pipola's former co-defendants James Rogers, James Loizzo, and Steven Small who became cooperating government witnesses in exchange for "§5K1.1" recommendations for more lenient sentences.

and abetting the robberies themselves (Counts One, Two and Four), but also for the carrying of firearms during those robberies (Counts Three and Five). Though there was evidence that Pipola knew firearms would be used or carried during the commission of a violent felony, there was no evidence that Pipola used or carried a firearm or provided, facilitated or otherwise encouraged the use of firearms.

B. **The Government's Case**

1. The September 21, 1992 Robbery

In June or July of 1992, James Rogers met with Jimmy Loizzo and Pat Caroleo to survey the Dubovsky Food Warehouse in Glendale, New York as a prospective sight for a robbery. On their way to the warehouse, Loizzo and Caroleo told Rogers of the plan to rob an Anchor Armored Delivery van that would be stopping at the warehouse to pick up a bag full of money for deposit. Loizzo explained that the robbery would be easy and all Rogers had to do was restrain the guard while Loizzo took the bag of money. When the three men arrived at the warehouse, they spent approximately two hours observing the location. Loizzo, Rogers and Dominick Martorella surveyed the robbery site on several subsequent occasions in anticipation of the robbery planned for September 21, 1992. According to the testimony of Loizzo, petitioner surveyed the robbery site on one occasion.

Later that week, Rogers spoke to Martorella who supposedly had connections to the warehouse and "inside

information on this particular job." Martorella told Rogers that "if there was ever any problem, neither one [of the guards] was going to resist because they both had families and they didn't want to take any chance getting hurt." Rogers was later told that only one man would be transporting the money and therefore the robbery would be even easier than originally expected.

In the days immediately preceding the September 21st robbery, the conspirators attended meetings at petitioner's house and at a McDonalds Restaurant to discuss details of their plan. Loizzo, Rogers, Martorella, Steven Small and Thomas Donohue attended all of these meetings; petitioner attended only the few meetings that took place at his home. According to Loizzo and Small, each separately discussed the robbery with petitioner. Small testified that his role in the first robbery was to provide a gun to Donohue, a getaway car, walkie talkies, and a back-up vehicle. Small **did not** testify, however, that petitioner either instructed or encouraged him to obtain a gun for use in the robbery.

On September 21, 1992, the day of the robbery, Rogers, Loizzo and Martorella met at a pizzeria before joining Small and Donohue at petitioner's house. Rogers, Loizzo, Martorella, Small and Donohue then drove to a McDonalds Restaurant to finalize plans for the robbery. The petitioner did not attend this meeting. The group agreed that, after the guard exited the building with the money, they would jump out with stockings over their heads and grab the bag of money. Martorella and Small,

outside the presence of petitioner, gave Loizzo and Donohue guns to use in the robbery while Rogers was unarmed.

From the McDonalds, the group drove to Otto Road where the Dubovsky warehouse was located and took up prearranged positions nearby. Donahue, Loizzo and Rogers sat and waited in Nocello's car for about an hour until a van drove up to the warehouse with two guards (instead of just one guard as they expected). The guards got out of the van and went into the warehouse. A few minutes later they came back out of the warehouse with a bag of money and the perpetrators pulled the stockings over their heads.

Just as the guards were about to re-enter the van, Donohue, Loizzo and Rogers sped up to the van in Nocello's car. Donohue and Loizzo jumped out of the car, pulled out their guns and held the guards at gunpoint, while Rogers grabbed the bag of money. Thereafter, they drove to petitioner's house where they gave the proceeds of the robbery to him. The cash was divided later that day.

2. The September 26, 1992 Robbery

After the September 21st robbery, Rogers, Small, Donohue and Martorella met at petitioner's house to discuss the possibility of robbing another Anchor Armed Delivery van scheduled to stop at a Citibank located on the corner of Flushing and Metropolitan Averues in Queens. Martorella and Rogers later surveyed the corner

of Metropolitan and Flushing Avenues, where they assessed the prospects for a second van robbery at that location. The next day, Rogers, Small, Martorella and Donohue met at petitioner's house to further plan the robbery. Petitioner indicated that he did not want anyone to get hurt and that all of the participants had to be comfortable with the plan. Rogers was to grab the money from the getaway car.

Donohue and Rogers drove out to Long Island the day before the robbery and stole a getaway car. Later that day, Small, Donohue, Rogers, Martorella and Jacobowitz met at petitioner's house. The robbery was again discussed and scheduled for that day. From petitioner's house, Small, Donohue, Rogers, Jacobowitz and Martorella drove to a park in Queens where, outside of petitioner's presence, another meeting took place to determine the specific roles of each participant. From the park they drove to the robbery site and waited for the van.

The Anchor Armored Delivery van soon arrived with two guards in it and parked directly across the street from a Citibank night depository box. The guard who was driving left the van with what appeared to be a bag full of money, while the other guard remained inside. As the guard with the bag approached the night depository drop, Rogers drew his gun, got out of the car and ran toward him. Simultaneously, Donohue pulled out his gun and ran toward the van. The two assailants pointed their guns at the guards and told them not to move. The guard who had remained in the van pulled out his gun but immediately

relinquished it after Donohue shouted at him to put the weapon down. In the meantime, Rogers told the other guard to drop the bag of money and back away. The guard dropped the bag and stepped back. Rogers grabbed the bag of money and got into the stolen getaway car with Donohue.

C. The Jury Instruction On Violations of 18 U.S.C. §924(c)(1) And On Aiding and Abetting A Violation Of That Statute[2]

The district court instructed as follows in connection with each of the charged violations of 18 U.S.C. §924(c)(1):

> The defendant is charged in Counts Three and Five with aiding, abetting, counseling, commanding, inducing and procuring the use, the using or carrying of a firearm during and in relation to a crime of violence. Counts Three and Five charge as follows:
>
> Count Three: On or about September 21, 1992, within the Eastern District of New York, the defendants, Anthony Pipola, Don Louis Martorella, Steven Small and Thomas Donohue,

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[2] The district court's charge was given on March 29, 1994. The appeal before the United States Court of Appeals with respect to that charge was argued on November 21, 1995 and decided April 29,1996. The decision in *Bailey v. United States, supra,* was decided on December 6, 1995, while the Court of Appeals decision was *sub judice.*

during and in relation to a crime of violence, to wit, the crime charged in Count Two, did knowingly use and carry a firearm, to wit, a handgun.

Count Five: On or about September 26, 1992, within the Eastern District of New York, the defendants, Anthony Pipola, Don Louis Martorella, Steven Small and Thomas Donohue, during and in relation to a crime of violence, to wit, the crime charged in Count Four, did knowingly use and carry a firearm, to wit, a handgun.

The relevant statute on this subject is provided in Section 924(c) of Title 18 United States Code, which provides:

Whoever, during and in relation to any crime of violence, for which he may be prosecuted in a court of the United States, uses or carries a firearm, shall be guilty of a crime.

The government must prove each of the following elements beyond a reasonable doubt in order to convict:

First, that on or about the date charged, the defendant was carrying or using a firearm;

Second, that the defendant had knowledge that what he was carrying or using was a firearm; and

Third, that he did so during and in relation to the commission of a crime of violence for which he might be prosecuted in a court of the United States.

The first element the government must prove beyond a reasonable doubt is that the defendant was carrying or using a firearm.

A firearm under the statute upon which these counts are based means "any weapon which will or is designed to or may readily be converted to expel a projectile by the actions of an explosive"

If you find that the defendant did not carry or use a firearm or if you have reasonable doubt as to this element, it is your duty to acquit the defendant on this count.

In order for the government to sustain its burden of proof that the defendant used a firearm. it is not necessary to establish that the weapon was fired. It is sufficient if the proof establishes that the firearm furthered the commission of the crime of violence or was an integral part of the underlying crime being committed.

The second element the government must prove beyond a reasonable doubt is that the defendant had knowledge that what he was carrying or using was a firearm as that term is generally used.

An act is done knowingly if done purposely and voluntarily, as opposed to mistakenly or accidentally. In order for the government to satisfy this element, it must prove that the defendant knew what he was doing. It is not necessary, however, for the government to prove that the defendant knew he was violating any particular law.

The third element the government must prove beyond a reasonable doubt is that the defendant unlawfully carried or used the firearm during and in relation to the crime of violence which he might be prosecuted in a court of the United States.

In this case, the government charges that the defendant unlawfully carried or used the firearm during and in relation to the robberies charged in Count Two and Four, respectively, of the indictment. You are instructed that robbery is a crime of violence for which the defendant may be prosecuted in a court of the United States.

You may consider for the purpose of the counts charged, charging use and carring of a firearm in connection with a crime of violence,

> only the evidence received for the felony which is the basis of that count (emphasis added).

In connection with the firearms charges, the district court, therefore, instructed the jury as follows:

> Aiding and abetting. In Counts Three and Five the defendant is also charged with aiding and abetting, counseling, commanding, inducing, or procuring the offense of the use of [sic] carrying a firearm [sic] a crime of violence.
>
> In this regard I have already instructed you, in connection with crimes charged in Counts Two and Four, on the requirements for finding a defendant guilty as an aider and abettor.
>
> In this regard I instruct you that to find a defendant guilty as an aider and abettor of Counts Three and Five you must find beyond a reasonable doubt that the defendant ***had knowledge that a firearm would be used or carried during and in relation to the crimes charged in Counts Two and Four.*** (emphasis added).

D. Conviction, Sentence, Judgment

Mr. Pipola was sentenced to consecutive terms of imprisonment of 97 months (Counts One, Two, and Four); 60 months (Count Three) and; 240 months (Count Five). Mr. Pipola's total term of imprisonment is 397

months plus three years supervised release on each count to run concurrently. A fine of $100,000.00 was imposed.

JURISDICTION OF THE LOWER COURTS

The District Court had jurisdiction over this case pursuant to 18 U.S.C. §3231. The Court of Appeals for the Second Circuit had subject-matter and appellate jurisdiction pursuant to 18 U.S.C. §1291.

REASONS FOR GRANTING THE WRIT

I. Section 924(c)(1) Gives Enhanced Punishment And Is, Therefore, Applicable Only To Those Who Have Personally Used a Firearm In Committing a Crime.

When a defendant commits a crime of violence while using or carrying a dangerous weapon, 18 U.S.C. §924(c)(1) mandates a five-year sentence[3] consecutive to that imposed on the substantive crime of violence. Section 924(c)(1) functions uniquely as a sentence enhancement for weapons use by individuals.[4] This case

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[3] The consecutive sentence can range as high as 30 years, depending on the type of dangerous weapon used in committing the predicate offense. In this case, the consecutive sentence imposed was *25* years.

[4] *See, e.g., Deal v. United States,* 113 S. Ct. 1993, 1997 (1993); *Busic v. United States,* 446 U.S. 398, *405* (1980); *see generally Busic, 446* U.S. at 399-410; *see also Bailey v. United States,* 116 S. Ct. 501, *505(1995)* ("Section 924(c)(1) requires the imposition of specified penalties if the defendant, 'during and in relation to any crime of violence or drug trafficking crime[,] uses or carries a firearm.' ") *(brackets in original); cf Busic,*

squarely presents the issue whether §924(c)(1) can be applied to someone who never used nor carried a firearm, nor who was present when a firearm was used and carried, but who aided and abetted or conspired with someone who used one.

In *Bailey v. United States*, 116 S. Ct. 501, 507, 509 (1995), this Court sharply limited §924(c)(1)'s application to individuals whose "use" of a gun was merely passive:

> In §924(c)(1), however, liability attaches only to cases of actual use, not intended use, as when an offender places a firearm with the intent to use it later if necessary.....
>
> The phrase "uses to commit" [in the original version of §924(c)(1)] indicates that Congress originally intended to reach the situation where the firearm was actively employed during commission of the crime. This original language would not have stretched so far as to cover a

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446 U.S. at 416 (Stewart, J., dissenting) (describing §924(c) as "[a] general enhancement provision - with its stiff sanctions for first offenders and even stiffer sanctions for recidivists"). Some circuits persist in treating §924(c) as a substantive offense, contrary to what this Court has said. *See, e.g., United States v. Hill, 971* F.2d 1461, 1464 & *n.3 (10th Cir. 1992) (en banc); United States v. Munoz-Fabela,* 896 F.2d 908, 910 (5th Cir.), *cert. denied,* 498 U.S. 824 (1990).

> firearm that played no detectable role in the crime's commission.
>
> ....
>
> To sustain a conviction under the 'use' prong of §924(c)(1), the Government must show that the defendant actively employed the firearm during and in relation to the predicate crime.

A conclusion extending liability to acts where a firearm is not disclosed or mentioned by the offender, the Court stated, "would distort the language of the statute." *Id.* at 508-09. Accordingly, "§924(c)(1) requires evidence sufficient to show an active employment of the firearm by the defendant, a use that makes the firearm an operative factor in relation to the predicate offense." *Id.* at 505.

Prior to *Bailey,* the Courts of Appeals had largely endorsed the so-called "fortress theory" of §924(c), which was grounded on actual or constructive possession and ownership or control -- which equated to "use" under §924(c)(1)-- of firearms, irrespective of actual individual participation or knowledge of the weapons.[5] *Bailey* "reject[ed] the fortress theory of use." *United States v.*

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[5] *See, e.g., United States v. Wight,* 968 F.2d 1393, 1396(1st Cir. 1992); *United States v. Carry,* 911 F.2d 72, 80 (8th Cir. 1990), *cert. denied,* 498 U.S. 1094 (1990); *United States v. Henry,* 878 F.2d 937, 944 (6th Cir. 1989); *United States v. Grant, 545* F.2d 1309, 1312-13 (2d Cir. 1976), *cert. denied,* 429 U.S. 1103 (1977).

Bingham, 1996 WL 163028, at *4, No.95-3006, *et al.* (6th Cir. Apr. 9, 1996); *accord United States v. Ramirez-Ferrer,* 1996 WL 125595, at *3~4, No.94-1018 (1st Cir. Mar. 27, 1996); *see Bailey,* 116 5. Ct. at 505-09.

The defendant's position here is that *Bailey's* rejection of the "fortress theory" necessarily includes a rejection of the vicarious liability under §924(c)(1) because it undermines the "fortress theory's" underlying premise of "constructive" or "group" §924(c)(1) liability based on who is in the fortress and who controls or owns the fortress' weapons inside.

As they did pre-*Bailey* and as the Second Circuit most recently held *in United States v. Masotto,* 73 F.3d 1233 (2d Cir. 1996), the circuit Courts of Appeals post-*Bailey* have continued to hold that a defendant may be found guilty of violating §924(c)(1) either on an aiding and abetting or *Pinkerton* theory.[6]

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[6] *See Pinkerton v. United States,* 328 U.S. 640 (1946). Significantly, in this case, the trial court retused to charge on a *Pinkerton* theory. *See also, United States v. Price, 76* F.3d *526,* 529 (3d Cir. 1996) (rejecting defendant's argument that aiding-and-abetting liability is inapplicable to § 924(c) charge, and holding: "It appears that no case in the Third Circuit has considered a conviction for violation of [§ 924(c)] on an 'aiding and abetting' theory. We see no reason, however, why we should rule differently from every other circuit in the country, and our own district courts. . . ."),' *United States v. Giraldo,* 80 F.3d *667* (2d Cir. 1996) (stating that if firearm were carried by or within reach of one defendant but not another, "that other defendant may be found liable for carrying the

Unlike the federal district court in *United States v. Foreman*, 914 F. Supp. 385 (C.D. Cal. 1996), the circuit courts of appeals have not questioned how *Bailey* limits vicarious liability, either through aiding-and-abetting or conspiracy theories.

In *Foreman*, the court noted that *Bailey*, "by defining 'use' according to its plain meaning, entirely strips away all the judicial 'gloss' that has expanded liability under §924(c). *Bailey* now limits liability almost entirely to those who personally 'use' or 'carry' a firearm." 914 F. Supp. at *385*. Accordingly, the court rejected the government's request for an instruction on §924(c)(1) aiding-and-abetting and conspiracy liability:

> The court should only give an aiding and abetting instruction on a §924(c) count when the government charges that the defendant aided and abetted the specific acts that fall within the literal definitions of "use" and "carry"....
>
> A charge of conspiracy to violate §924(c) would fail for the same reasons....just as the government must prove that an aider and a

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gun either on a *Pinkerton* theory, or on an aiding-and-abetting theory") (citations omitted); *United States v. Monroe*, *73 F.3d 129*, 132 (7th Cir. 1995) (post-*Bailey* decision noting that co-conspirator charged under §924(c) "is liable for the acts of co-conspirators in furtherance of the conspiracy, including violations of [§924(c)]").

> better under §924(c) aided or abetted the specific 'use' or 'carrying' of a firearm, the government must prove that a defendant agreed to the specific 'use' or 'carrying' of a firearm before an instruction for conspiracy under §924(c) is appropriate. The agreement to participate in an armed robbery cannot double as the agreement to use or 'carry' a gun....
>
> *Bailey clarifies that the purpose of §924(c) is to single out the actual user or carrier of a gun during a violent crime.* This person is deemed more culpable for the gun offense, and the added violence that flows from using or carrying a gun.

914 F.Supp. at 387-88 (emphasis supplied).

The reasoning in *Foreman* is persuasive. Enhancement under §924(c)(1) should be married to the notion that a defendant for whom vicarious §924(c)(1) enhancement is sought must be at least as "active" in the use or carrying of a firearm in the predicate offense as was the actual user or carrier. A sentence enhancer that imposes substantial consecutive punishment ought to be grounded on more than vicarious "use."

The purpose of §924(c)(1) was to punish more severely, and thereby deter a class of individuals who have introduced greater danger to life by the use or carrying of firearms than would otherwise be the case in a crime of violence. *See Deal,* 113 5. Ct. at 1998. The

language of §924(c)(l) itself recognizes the need to define the individualizing characteristics of the offenders it seeks to target: they must have sought to "dramatically heighten [ ] the danger to society," *Smith v. United States,* 113 S.Ct. 2050, 2059 (1993) (internal quotations omitted), by introducing a deadly weapon into an already violent crime.

In analogous situations, where Congress sought to create a special class of offenders, courts of appellate jurisdiction have not hesitated to limit vicarious criminal liability. *See, e.g., United States v. Amen,* 831 F.2d 373, 381 (2d Cir. 1987) (a prosecution under 21 U.S.C. §848 applies only to a person in charge of a CCE and one cannot incur vicarious liability by aiding and abetting such a person. *Gebardi v. United States,* 287 U.S. 112, 123, 53 S.Ct. 35, 38 (1932) (acquiescing woman not guilty of aiding abetting Mann Act violations); *United States v. Farar,* 281 U.S. 624, 634, 50 S.Ct. 425, 427 (1930) (liquor purchaser not guilty of aiding and abetting illegal sale).

The problem with aiding and abetting §924(c)(1) liability is illustrated here. Petitioner's §924(c)(1) aiding and abetting liability was founded on the notion that he knew that a firearm would be used in the robberies. His §924(c)(1) aiding and abetting liability was further founded on the government's contention that he facilitated the use or carrying of a gun during the robberies. Significantly, there was no testimony indicating that the weapons used were exchanged on or

near the petitioner's household or that he even knew where or when the guns were to be provided. The jury was permitted to infer that because the petitioner attended several planning sessions, he must have known that guns were to be used in the robberies. Further, there was no evidence presented to establish that "petitioner consciously and affirmatively ... performed some act that *directly* facilitated or encouraged" the specific crime of using or carrying a firearm as required by the Second Circuit in *United States v. Medina*, 32 F.3d 40 (2d Cir. 1994) (emphasis supplied). Thus, §924(c)(1) vicarious liability based on an aiding and abetting theory fails to consider the "dangerousness" of the defendant who neither carried nor used any weapon. In such a case, the *raison d'etre* of §924(c)(l) is lost when a defendant does not control the introduction of a firearm into a crime of violence committed solely by co-defendants.

Consequently, the §924(c)(1) sanction does nothing to deter a defendant and strays from the "need for individualized sentencing." *Witte v. United States*, 115 S.Ct. 2199, 2205 (1995).

In sum the imposition of vicarious liability fails to recognize *Bailey's* underlying assumption that §924(c)(1) is intended to identify individuals prone to committing uniquely death-conducive crimes and singularly to deter and punish them. This intent is inconsistent with 18 U.S.C. §2 and its objective of unifying the common law concepts of principals in degree and accessories before the fact, *see United States v. Tobon-Builes*, 706 F.2d

1092-1100 (11th Cir. 1983); *United States v. Molina, 581* F.2d 56, 61 n. 8 (2d Cir. 1978).

While *Bailey* holds that a conviction under §924(c)(1) must be premised on the abrogation of "constructive" liability and the actual, personal conduct of the defendant, the courts have continued to permit another kind of constructive liability-vicarious liability - that ignores the defendant's actual conduct. Because of this inconsistency, this Court should grant certiorari review to consider the viability of vicarious liability after *Bailey.*

II. *Bailey v. United States*, 116 S.Ct. 501(1995), Decided While This Case Was *Sub Judice*, Before The United States Court Of Appeals, Requires A Remand To Determine Whether The District Court's Jury Instructions Which Failed To Define "Use" and "Carry" Was Reversible Error.

In *Bailey,* this court held that "§924(c)(1) requires evidence sufficient to *show active employment* of the firearm by the defendant, a use that makes the firearm an operative factor in relation to the predicate offense." 116 S.Ct. at *505* (emphasis added). Implicit in this holding was the notion that the trial court in its instructions to the jury must define the terms "use" and "carry" and cannot simply rely, as did the district court in this case, on language that evidence of use "is sufficient if the proof establishes that the firearm furthered the commission of the crime of violence or was an integral part of the

underlying crime being committed." To condone the "in furtherance" language would permit the jury to convict based on the "accessibility and proximity rule" squarely rejected by this court in *Bailey.* There is little doubt that a weapon, which is accessible or proximate to a defendant during a robbery "furthers" or is an "integral part" of the crime but falls short of this active employment definition approved in *Bailey. See, e.g., United States v. Spring,* 80 F.3d 1450 (10th Cir. 1996) (remanding in light of *Bailey:* "the jury instruction did not focus the jury's attention on the elements of the 'carry' prong of §924(c)(1), and we cannot say with certainty that a properly and fully instructed jury would have found Mr. Spring guilty of aiding and abetting in the carrying of a firearm.")

At the time the charge was given to the jury, defense counsel did not raise any objection. However, the petitioner should not now be penalized for failing to raise an objection to this charge because at the time, the court's instruction on the law was correct. *United States v. Viola,* 35 F.3d 37, 42, 43 (2d Cir. 1994) (a defendant clearly has no duty to object to a jury instruction that is based on firmly established circuit authority). Defense counsel refrained from objecting to the charge at the time it was administered because, under then existing case law, a defendant could be found to aid and abet a violation of §924(c)(1) merely by planning a crime of violence with the knowledge that a firearm would be used, regardless of whether the defendant committed any act to facilitate or encourage the use (without definition) of a firearm. *See, e.g, United States v. Thomas,* 987 F.2d 697, 701-702

(11th Cir. 1993); *United States v. Williams*, 985 F.2d 749, 756 (5th Cir.), *cert. denied*, ___ U.S. ___, 114 S.Ct. 148 (1993); *United States v. Gunning*, 984 F.2d 1476, 1483 (7th Cir. 1993); *Morrow*, 977 F.2d at 231; *United States v. Powell*, 929 F.2d 724, 726-28 (D.C. Cir. 1991). Evidence of use was apparently sufficient if the proof established that the firearm furthered the commission of the crime of violence or was an integral part of the underlying offense. *See, e.g., United States v. James*, 998 F.2d 74, 81-82 (2d Cir.), *cert. denied*, ___ U.S. ___, 114 S.Ct. 415 (1993); *United States v. Grubczak*, 793 F.2d 458, 462-63 (2d Cir. 1986).

Given the state of the law in the Second Circuit prior to *Bailey*, it was reasonable for defense counsel to refrain from objecting to the §924(c)(1) and aiding and abetting charges to the jury. Consequently, there has been no forfeiture with respect to the district court's erroneous §924(c)(1) charge. *United States v. Olano* ___ U.S. ___ 113 S.Ct. 1770 (1993).

Although the plain error standard would normally apply where an attorney fails to object to an erroneous charge (Fed.R.Crim.P. 52(b)), "[t]he situation is different when a supervening decision alters settled law." In such an instance, a **"modified plain error"** analysis is applied which requires the government to prove that the defendant was not prejudiced by the erroneous instructions. *Viola*, 35 F.3d at 42-43 (emphasis added). Under the *Olano* standard and pursuant to Fed.R.Crim.P. *52(b)*, the defense must initially show the "the jury

instruction was error as a deviation from the current law of *Bailey* and the error was plain." *Id.* at 43 [citations omitted]. The government, not the defense, must then persuade the reviewing court that a substantial right of the defendant was not affected, *i.e.*, that the defendant was not prejudiced.[7]

This court should reverse and remand the petitioner's convictions under Counts Three and Five because the supervening decision in *Bailey v. United States, supra,* has rendered the trial court's instruction under §924(c)(1) and the aiding and abetting charge erroneous as a matter of law. To allow these convictions to stand would be a miscarriage of justice under either a "plain error" or "modified plain error" analysis.

Dated: New York, New York
July 24, 1996

Respectfully submitted,

JOHN L. POLLOK
Attorney for Anthony Pipola
260 Madison Avenue
New York, New York 10016
(212) 679-2900

Counsel for Petitioner

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[7] There can be no dispute that a substantial right was affected by the court's erroneous charge since the sentences imposed for the firearms charges run consecutive to his other sentences.

No. _____

In The

Supreme Court of the United States

October Term, 1995

—♦—

ANTHONY PIPOLA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

APPENDIX

SW

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Appendix A - Decision and Order of Affirmance of the United States Court of Appeals for the Second Circuit (Decided April 29, 1996) [Pages 1a - 21a]

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 490—August Term 1995

(Argued November 21, 1995 Decided April 29, 1996)

Docket No. 95-1264

UNITED STATES OF AMERICA,

Appellee,

—v.—

ANTHONY PIPOLA,

Defendant-Appellant.

Before:

CARDAMONE, WALKER, and PARKER,

Circuit Judges.

Defendant was convicted in the United States District Court for the Eastern District of New York (Johnson, J.) of conspiracy to obstruct commerce by robbery (one count), aiding and abetting robbery (two counts), and

aiding and abetting the carrying or use of a firearm during a crime of violence (two counts). On appeal, he contends that the trial court improperly instructed the jury on the firearms counts, that the evidence was insufficient to support convictions of those counts, and that the trial court improperly admitted prejudicial evidence of other wrongs.

Affirmed.

JOHN L. POLLOK, New York, New York (Michael S. Pollok, Daniel E. Katcher, Hoffman & Pollok, New York, New York, of counsel), *for Defendant-Appellant.*

MARK W. LERNER, Assistant United States Attorney, Brooklyn, New York (Zachary W. Carter, United States Attorney, Emily Berger, Assistant United States Attorney, Eastern District of New York, Brooklyn, New York, of counsel), *for Appellee.*

CARDAMONE, *Circuit Judge*:

Defendant Anthony Pipola appeals from a May 4, 1995 judgment entered in the Eastern District of New York following a jury trial before United States District Judge Sterling Johnson convicting him of a robbery conspiracy to obstruct commerce in violation of 18 U.S.C.

§ 1951(a) (1994) (count one), of aiding and abetting the obstruction of commerce by means of a robbery in violation of 18 U.S.C. §§ 2(a), 1951(a) (counts two and four), and of aiding and abetting the use or carrying of a firearm during a crime of violence in violation of 18 U.S.C. §§ 2(a), 924(c)(1) (counts three and five). He is presently serving concurrent 97-month prison sentences for the robbery and conspiracy counts and consecutive terms of 60 months and 240 months for each of the firearms charges. The total term of imprisonment is 397 months.

The principal issue for us to decide is whether the defendant's conviction for aiding and abetting the use and carrying of a firearm during a crime of violence should be affirmed. That is, we must decide whether Pipola acted simply as a cheerleader, egging on his co-conspirators to commit the robberies, or whether he actively assisted the other defendants in their use of firearms during the crimes they committed after leaving his house all-armed, so that his assistance facilitated the successful achievement of this additional offense. We conclude that Pipola performed the latter, not the former, role. Hence, we affirm.

FACTS

A. *The Two Robberies*

The charges against defendant and six other defendants arose in connection with two armed robberies, one on September 21 and the other on September 26, 1992, during which cash and checks were taken from employees of Anchor Armored Delivery, Inc. (Anchor). The earlier robbery took place outside the Dubovsky & Sons

warehouse on Otto Road in Glendale, a neighborhood in Queens County, New York. The later crime occurred at Citibank on Metropolitan Avenue, in Ridgewood, Queens.

1. *Early Failures*

In the summer of 1992, before the September robberies occurred, Pipola suggested to some of his co-conspirators the possibility of robbing armored vehicles. After two scouting trips to observe the Dubovsky & Sons location, Pipola and several of the other defendants went to the warehouse in two cars. During that visit, Pipola slightly modified the robbery plan and, in anticipation of the appearance of the armored vehicle, handed a pistol to co-conspirator James Loizzo. That robbery attempt was aborted when the armored vehicle failed to appear.

Pipola then enlisted defendant Steven Small's help in late August 1992 for a planned robbery at the Metropolitan Avenue office of Citibank. Small testified that his role was "to supply a getaway car, a gun, a police scanner, and walkie-talkies." When Pipola also asked Small if he had any friends who would participate, Small recruited defendant Thomas Donohue.

When—in accordance with Pipola's instructions—Small, Donohue, and Donohue's brother went to Pipola's house in early September, Small spoke with Pipola privately and was told to follow defendant Don Louis "Dominick" Martorella to the bank on Metropolitan Avenue, where he and Martorella were to wait in a prearranged location. The plan was for the Donohues to lie in wait close to the bank and intercept the guards once they exited the armored truck. Small gave Donohue a .22

caliber pistol to use in the hold-up. Because Martorella and Small chose the wrong spot, they did not see the armored truck arrive and the four defendants were forced to return to Pipola's residence empty-handed. A similar attempt by Small and the Donohue brothers to rob the bank was equally unsuccessful.

2. *Dubovsky Warehouse Robbery*

Meanwhile, Pipola, undeterred by the earlier failed attempt to rob the armored vehicle at the Dubovsky & Sons warehouse, brought defendants Loizzo, Small, Donohue, and Martorella together at his house to discuss that target. During the discussions Small was told that he was to play the same role as he had for the aborted Citibank robbery—supplying a gun, scanner, and walkie-talkies, and bringing Donohue. When the group convened at Pipola's residence on September 20, it was decided that the robbery would take place the next day. Donohue arrived at Small's house on the day of the robbery and picked up two pistols: a .22 caliber pistol belonging to Small and Donohue's own .380 caliber pistol. After purchasing walkie-talkies, Small met Donohue, Loizzo, James Rogers, and Martorella at a McDonald's restaurant. Martorella and Loizzo had just come from Pipola's house, where they had discussed the plan with Pipola. The entire group then proceeded in two cars to the Dubovsky warehouse.

Loizzo testified that he and Donohue, wearing ski masks and brandishing guns, robbed the Anchor guards upon their arrival at the warehouse. Defendant Rogers, who also wore a mask, took the bag of money from one of the guards. Small and Martorella waited in other vehicles near the scene. Loizzo, Martorella, and Rogers went

from the scene of the robbery to Pipola's house where Pipola opened the bag and distributed shares of the crime's proceeds to the participants. Small and Donohue also returned to Pipola's place that day and discussed the robbery, and later collected their share of the stolen money from Martorella.

3. *Citibank Robbery*

On September 25, 1992 Small and Donohue again went to Pipola's house, where they met with Pipola and Martorella to discuss the Citibank robbery. Small and Martorella were to take up positions in their vehicles near the bank; Donohue and Rogers were to wait near the deposit box. Small testified that although he was supposed to supply a gun, the others still had his gun from the September 21 robbery. Pipola, Martorella, Small, Donohue, Rogers, and Mark Jacobowitz met on the day of the Citibank robbery and finalized the plan. According to defendant James Rogers' testimony at trial, Pipola told the others that Jacobowitz—a Pipola associate who had not previously been involved—"was just going to drive around, more or less keep tabs on everybody and make sure everything [went] okay." After Pipola ascertained that everyone was ready, the other defendants left Pipola and drove to Metropolitan Avenue in three different vehicles, including a stolen getaway car. Shortly after the robbers took up their positions, the armored vehicle appeared. Rogers and Donohue approached the two guards, pointing their weapons. After disarming one of the guards, they took a bag of money and escaped.

Following the commission of this crime, Small picked up Rogers and Donohue and brought the money to

Pipola, who again divided the proceeds into shares for the various defendants. A few days later, several of the conspirators met twice at Pipola's house, drinking first to "a job well done" and later receiving a warning from Pipola not to spend the money or talk about the robberies.

B. *The Arrests, Trial, and Conviction*

Fingerprints taken from the getaway car abandoned after the Dubovsky robbery led to the identification of defendant James Rogers. James Loizzo then became a confidential informant. The other conspirators were thereafter arrested and charged. The six co-conspirators—Loizzo, Rogers, Small, Donohue, Martorella, and Thomas Nocella—entered guilty pleas. Pipola stood trial and was convicted before a jury.

At trial, cooperating witnesses Small, Loizzo, and Rogers described the roles of the participants, including Pipola, as explained earlier. The government also produced the Anchor employees who witnessed the crimes, tapes of conversations in which Pipola incriminated himself, and telephone records reflecting communications between the conspirators. Jose Ledesma, an Anchor guard, testified that on September 21, 1992 he was attacked by three men as he exited the Dubovsky & Sons warehouse. Two of the assailants threatened him and his partner with guns, and took a bag containing checks and cash. Jose Lugo, another Anchor guard, described the September 26 robbery, stating that two men armed with handguns forcefully took currency that he and his partner were delivering to Citibank.

Pipola was convicted of all five counts. On appeal he contends the jury was improperly charged with respect to the aiding and abetting the use or carrying of firearms, the evidence produced against him was insufficient to support his convictions on those counts, and the trial court erred in admitting evidence of previous transactions involving him and his co-conspirators. We discuss each of these contentions in order.

DISCUSSION

I The Contested Jury Charge

A. *Charge of Aiding and Abetting*

It is Pipola's argument that the jury instruction with respect to aiding and abetting the use or carrying of a firearm was inconsistent with the rule laid down in *United States v. Medina*, 32 F.3d 40 (2d Cir. 1994). Because Pipola did not object at trial to the charge he now challenges on appeal, his only hope for relief is in Rule 52(b) of the Federal Rules of Criminal Procedure, the "plain error" rule. But our authority to reverse for errors not urged to the trial court is narrow indeed. *See United States v. Olano*, 507 U.S. 725, 731-32 (1993). First, of course, there must be an error; absent a valid waiver by defendant, a trial judge's deviation from a legal rule is considered an error. *Id.* at 732-33. Second, the error must be plain, that is, one obviously wrong in light of existing law. *Id.* at 734. Third, the error must have affected the defendant's substantial rights, which ordinarily means that it must have prejudiced him. *Id.*

The challenged instruction was as follows:

> In Counts Three and Five the defendant is also charged with aiding and abetting, counseling, commanding, inducing or procuring the offense of carrying a firearm a [*sic*] crime of violence.
>
> . . . . I have already instructed you, in connection with the crimes charged in Counts Two and Four, on the requirements for finding a defendant guilty as an aider and abettor.
>
> . . . . I instruct you that to find a defendant guilty as an aider and abettor of Counts Three and Five, you must find beyond a reasonable doubt that the defendant had knowledge that a firearm would be used or carried during and in relation to the crimes charged in Counts Two and Four.

Before giving this charge, the trial judge had instructed the jury regarding the counts of aiding and abetting the robberies (counts two and four), explaining, in substance, that the government must prove beyond a reasonable doubt that someone other than the defendant committed the robberies and that the defendant aided and abetted the commission of such underlying crime.

The trial court went on to state that the defendant must have knowingly and willfully facilitated or encouraged the commission of the crime by some act or omission, and that the "mere presence of the defendant at the scene of a crime or acquiescence . . . in the criminal conduct of others, even coupled with the knowledge that the crime is being committed, is not sufficient to establish aiding and abetting." It also set forth the substantive requirements for liability under 18 U.S.C. § 924(c) for using or carrying a firearm in relation to a crime of violence.

B. *Law of Aiding and Abetting*

Under the terms of 18 U.S.C. § 2(a) (1994), [w]hoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal." To be convicted of aiding and abetting, the defendant must have taken some conscious action that furthered the commission of the underlying crime. *See United States v. Dickerson*, 508 F.2d 1216, 1218 (2d Cir. 1975). The government must therefore prove the underlying crime was committed by someone other than the defendant and that the defendant himself either acted or failed to act with the specific intent of advancing the commission of the underlying crime. *See United States v. Labat*, 905 F.2d 18, 23 (2d Cir. 1990).

To show specific intent the prosecution must prove the defendant knew of the proposed crime—suspicion that it might occur is not enough—and had an interest in furthering it. *See United States v. Wiley*, 846 F.2d 150, 154 (2d Cir. 1988). In sum, to prove the act and intent elements for aiding and abetting the commission of a crime, the evidence must demonstrate that the defendant joined and shared in the underlying criminal endeavor and that his efforts contributed to its success. *See United States v. Zambrano*, 776 F.2d 1091, 1097 (2d Cir. 1985).

The crime underlying counts three and five in the present case is a violation of 18 U.S.C. § 924(c): "[w]hoever, during and in relation to any crime of violence . . . uses or carries a firearm" commits a crime. Robbery is a "crime of violence" under the statute. *See* § 924(c)(3). In *Medina* we addressed the specific question of whether a defendant's knowledge that a gun will be used in the underlying offense is alone sufficient to

support a conviction for aiding and abetting a violation of § 924(c). We held that it is not. *Medina*, 32 F.3d at 46. Roberto Medina had recruited one Lopez to rob Medina's former employer, and Lopez enlisted the assistance of two other persons. In arguing that this evidence was sufficient to support an aiding and abetting charge against Medina, the government relied on proof that Medina in a discussion with Lopez referred to the robberies as "stickups," offered to supply Lopez with a gun, and actually gave Lopez a revolver before the robbery. *Id.* at 45.

Because aiding and abetting requires a defendant's conscious assistance in the commission of the specific underlying crime, we held that none of the actions taken by Medina was sufficient. *Id.* There must be proof, we said, that the defendant's actions directly facilitated or encouraged either the use of or the carrying of a firearm. Hence, although Medina knew that a gun would be used in the robbery, there was no evidence he prompted or induced such use. *Id.* The gun he supplied was never used because Lopez, who was a confidential informant, actually gave the firearm to a government agent before the robbery was attempted. *Id.* at 43, 45. Even though Lopez' recruits carried guns during the robbery's commission, no evidence suggested that Medina promoted *their* use. Because the accomplices' use of those guns was "a foregone conclusion" and they were not told of Medina's offer to supply a gun, Medina could not be guilty of facilitating or encouraging their use. *Id.* at 46.

C. *Review of Instant Jury Charge*

The jury instructions in the present case, though not a model of clarity, correctly track the law set forth in *Med-*

ina. In evaluating a challenge to a jury instruction, an appellate court must focus first on the specific language of the charge. *See California v. Brown*, 479 U.S. 538, 541 (1987); *United States v. Coyne*, 4 F.3d 100, 113 (2d Cir. 1993), *cert. denied*, 114 S. Ct. 929 (1994). To determine if the challenged instruction passes muster, the reviewing court must next examine the entire charge to see if—looked at as a whole—it conveyed to the jury a correct view of the law. *Brown*, 479 U.S. at 541. When jury instructions are susceptible to more than one possible interpretation, our task is to determine whether there is a reasonable likelihood that the jury applied them in a way that deprived defendant of his rights. *Boyde v. California*, 494 U.S. 370, 380 (1990); *see Estelle v. McGuire*, 502 U.S. 62, 72 & n.4 (1991) (reaffirming *Boyde* standard as a "single standard of review for jury instructions"); *United States v. Birbal*, 62 F.3d 456, 462 (2d Cir. 1995) (applying "reasonable likelihood" standard to direct review of federal conviction).

Defendant urges that the charge as given was in error because it instructed the jury that Pipola could be guilty simply because he knew that a firearm would be used or carried during the two robberies. More particularly, he maintains that the instruction omitted the requirement of an act directly promoting the firearms violation, as opposed to an act merely promoting the general criminal endeavor. *See Medina*, 32 F.3d at 45. Pipola further asserts that his counsel's failure to object to the instruction at the trial should be excused because a supervening decision—*Medina*—changed the law of this Circuit. We reject these arguments.

The trial court concededly instructed the jury—with respect to counts three and five—that knowledge that a gun would be used was necessary to establish liability as

an aider and abettor. However, nowhere in the instructions did the district court charge that knowledge alone was sufficient. It explained that in evaluating those counts the jury must apply the general aiding-and-abetting instructions given with respect to the two counts of aiding and abetting the obstruction of commerce by robbery (counts two and four). These instructions correctly required the jury to find that someone committed the underlying crime—in the case of counts three and five, the relevant § 924(c) firearms offense—and that defendant knowingly facilitated the commission of the offense by some act or omission. In addition, the jury was specifically cautioned that defendant's presence at the crime scene or his acquiescence in the criminal conduct of others, even joined with knowledge that the crime would be committed, would not support a conviction for aiding and abetting.

Although when viewed in isolation, the instruction setting forth the knowledge requirement did not state the elements of aiding-and-abetting completely, we think the instructions as a whole "delivered a correct interpretation of the law." *Brown*, 479 U.S. at 541. Defendant's argument takes the instruction that knowledge is required out of context and ignores the fact that the general instructions were explicitly incorporated into the charge. In addition to knowledge that a firearm will be used, *Medina* simply requires that there be an act or omission promoting the use of the firearm. The trial court's instructions effectively communicated this requirement.

In our recent decision in *United States v. Masotto*, 73 F.3d 1233 (2d Cir. 1996), a defendant convicted of robbery appealed his conviction of aiding and abetting the carrying or use of a firearm. Masotto argued, as does the

defendant here, that the trial court erroneously instructed the jury that liability could be based on " 'mere knowledge' that members of the crew might use firearms without proof that [the defendant] 'performed some act that directly facilitated or encouraged the use or carrying of a firearm.' " *Id.* at 1240 (citing *Medina*, 32 F.3d at 45). We turned this challenge aside, holding that the general instructions on liability as an aider and abettor required the jury to find more than knowledge: the jury was required to find that all the elements of the underlying firearms offense were committed by some person and that the defendant participated in the commission of the offense. *Id.* at 1240. The instant case is indistinguishable from *Masotto*. Read as a whole, the instructions effectively explained that the defendant must have directly facilitated the commission of the firearms offense. Therefore, there is no reasonable likelihood that the conviction was based on an erroneous view of the law.

Defendant thinks plain error review should be less stringent in the present case because an intervening decision changed settled law of this Circuit. *See United States v. Viola*, 35 F.3d 37, 41-42 (2d Cir. 1994), *cert. denied*, 115 S. Ct. 1270 (1995). In such cases, it is the government that has the burden of showing that defendant's substantial rights were not affected. *Cf. Olano*, 113 S. Ct. at 1777 ("We need not consider the special case where the error was unclear at the time of trial but becomes clear on appeal because the applicable law has been clarified."). Defendant believes that *Medina* changed—or at least clarified—the requisite elements of aiding and abetting a violation of § 924(c). However, because in our view the jury instructions in the case at hand did not constitute error, we need not reach the prejudice component of the plain error inquiry.

II Sufficiency of the Evidence

Pipola next avers that the evidence was insufficient to support liability for aiding and abetting the carrying or use of a firearm in connection with a crime of violence. A defendant challenging the sufficiency of the evidence bears a heavy burden because in reviewing such a claim, the evidence is viewed in the light most favorable to the prosecution, *see Glasser v. United States*, 315 U.S. 60, 80 (1942), and reasonable inferences and credibility determinations are to be drawn in its favor. *See United States v. LaPorta*, 46 F.3d 152, 162 (2d Cir. 1994). When the evidence, viewed in this light, may be said to convince any rational trier of fact that the defendant is guilty beyond a reasonable doubt, the conviction must be upheld. *See Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *United States v. Stanchich*, 550 F.2d 1294, 1299 (2d Cir. 1977) (Friendly, J.).

Here the evidence was sufficient to convict Pipola of aiding and abetting the use of a firearm in connection with both robberies. We are unable to agree with defendant's suggestion that the evidence in his case was weaker than that in *Medina*. In *Medina*, 32 F.3d at 42, the proof was found insufficient because it did not show an "act that specifically aided and abetted the use or carrying of a gun during the attempted robbery" and because Medina's plans for the robbery did not include a gun that was actually carried or used. In the instant case, however, the proof permitted the jury to infer that Pipola specifically encouraged the use of firearms in the robberies.

Co-conspirator Small's testimony concerning the August 1992 conversation—during which Pipola recruited him for the Citibank robbery—allowed the jury

to conclude that Pipola delegated to Small the task of providing a gun. Small recounted how he was told to play the same role, including the delivery of a gun, for the Dubovsky robbery, and said that his role in the latter robbery was discussed at Pipola's house. Because there was considerable evidence that Pipola made planning decisions as the leader of the group, the jury was entitled to infer that it was defendant's aim to encourage Small to make a gun available when the crimes were committed. Moreover, Small testified that he discharged his assigned task by arming Donohue, one of the gunmen, on the morning of the September 21 robbery. As a result, Pipola's acts related directly to the firearm that was actually used in the first robbery.

Pipola further insists that the evidence regarding the second robbery is insufficient, even if the count of aiding and abetting the use of a firearm in the first robbery is upheld. Again, the testimony permitted the inference that Pipola, relying on a tip from Martorella, devised a plan to rob an armored truck at Citibank's Metropolitan Avenue office. That plan, as evidenced by the conversation in which Pipola assigned to Small the role of providing a weapon, included the carrying of firearms by the participants. By giving Small the task of supplying a gun, Pipola "acted . . . with the specific purpose of bringing about the underlying crime." *Labat*, 905 F.2d at 23. The proof showed that Donohue, instead of returning Small's .22 caliber pistol after the Dubovsky robbery, retained it for the Citibank robbery. Pipola's actions placing Small in charge of arming Donohue demonstrated that he "joined the venture, shared in it, and that his efforts contributed towards its success." *Zambrano*, 776 F.2d at 1097.

Pipola now argues that there was no proof that he directly assisted in the use of the guns, gave weapons to the gunmen, or allowed weapons to be exchanged at his house. This argument mistakenly assumes that the only way to aid another's use of a gun is to deliver it personally. Instead, under 18 U.S.C. § 2 and § 924(c), all that is required to prove aiding and abetting is some act directly facilitating or encouraging the use or carrying of a firearm, as opposed to only having knowledge that a firearm will be used in the robbery. The evidence in the present case was sufficient for such purposes: Pipola designed the plans for two robberies and these plans, including the use of firearms, were effectuated through the acts of his co-conspirators.

Defendant's heavy reliance on *Medina* is misplaced. There the weapon supplied by Roberto Medina was given to a detective before the attempted robbery; here the pistols supplied by Small at the instigation of Pipola were used during the commission of the crimes. Medina only knew a co-conspirator would carry a gun; here there was proof Pipola acted to encourage the carrying of guns by his co-conspirators. In *Medina*, the use of a gun was a foregone conclusion, whereas in the present case using guns was an idea originated by defendant. The proof at trial demonstrated that Pipola discussed the robberies with the persons who carried them out, assigned particular roles to the various participants, and actively assisted (through Small) in the carrying and use of firearms. In short, Pipola failed to show the evidence was insufficient.

Appendix A

III Evidence of Other Wrongs

The final issue defendant raises is whether the trial court improperly admitted evidence of crimes other than those charged, in contravention of Rule 404(b) of the Federal Rules of Evidence. The challenged evidence consisted of testimony by James Loizzo and Steven Small, Pipola's co-conspirators who cooperated with the government. The trial court made a pretrial ruling on the admissibility of proffered evidence of other crimes aimed to show Pipola's involvement in the following activities with his co-conspirators: making various loans and collecting debts, committing crimes including armed robberies and a burglary, and using and selling stolen and counterfeit credit cards. Judge Johnson ruled that such evidence was relevant because it helped explain the background of the conspiracy and the development of the relationships between defendant and the other conspirators; he also ruled that its probative value was not outweighed by the possibility of unfair prejudice.

At the trial, Loizzo testified that in 1989, when he and Pipola first met, Pipola agreed to loan him money to cover a debt to a drug dealer. Shortly thereafter, Loizzo stated, he began to give Pipola "tips" about potential robbery or burglary targets. Loizzo averred that before he knew Pipola very well, Pipola, acting on a tip, arranged a burglary. Loizzo also declared that he and Pipola attempted to rob a drug dealer and burglarize a house, all to no avail, but that Loizzo "earned some respect" from Pipola when he finally deduced the location of the dealer's cache.

Pipola also complains of testimony by Loizzo, along with tape-recorded conversations, suggesting that Pipola and his co-conspirators made usurious loans. In addition,

defendant cites an instance where Loizzo testified that Pipola sought information about drug dealers to rob. Moreover, Pipola asserts that Small was improperly allowed to testify that he, Loizzo, Pipola, and others in 1991 robbed a warehouse in which marijuana was being grown.

Under Rule 404(b), "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith," but such evidence may be admissible to show "proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Our inclusionary interpretation of the rule allows evidence of other wrongs to be admitted so long as it is relevant and it is not offered to prove criminal propensity. *See, e.g., Berkovich v. Hicks*, 922 F.2d 1018, 1022 (2d Cir. 1991). One legitimate purpose for presenting evidence of extrinsic acts is to explain how a criminal relationship developed; this sort of proof furnishes admissible background information in a conspiracy case, *United States v. Lasanta*, 978 F.2d 1300, 1307-08 (2d Cir. 1992). Such proof may also be used to help the jury understand the basis for the co-conspirators' relationship of mutual trust, *see United States v. Rosa*, 11 F.3d 315, 334 (2d Cir. 1993), *cert. denied*, 114 S. Ct. 1565 (1994).

When the government seeks to introduce such extrinsic evidence, the trial court must first determine whether it is admissible under Rule 404(b). If so, it must then determine whether the probative value of the evidence is substantially outweighed by the risk of unfair prejudice. *See* Fed. R. Evid. 403. If the evidence is ruled admissible, the trial court, when the defendant so requests, must give a limiting instruction. *See* Fed. R. Evid. 105. Broad discretion resides in the district court regarding the

admissibility of evidence of extrinsic acts, *see Berkovich*, 922 F.2d at 1022, and such rulings are reversed only for a clear abuse of discretion. *See United States v. Sappe*, 898 F.2d 878, 880 (2d Cir. 1990). To find such an abuse we must be persuaded that the trial judge ruled in an arbitrary and irrational fashion. *See United States v. Pitre*, 960 F.2d 1112, 1119 (2d Cir. 1992).

The district court did not abuse its discretion in the present case. In its pretrial ruling and at various times during the trial, it ruled the evidence was relevant as background information to make the story of the crimes charged complete and to enable the jury to understand how the illegal relationship between the co-conspirators developed. The government undertook to show that Pipola played a leadership role in organizing two armed robberies involving a number of other individuals, each of whom performed assigned functions. The evidence of prior illicit activities involving Pipola and his co-conspirators explained to the jury how the relationship between Pipola and his underlings evolved. The challenged testimony made the 1992 conspiracies to commit armed robberies, in which Small and Loizzo also played key parts, more plausible.

This evidence was relevant and was offered for a purpose other than to show propensity, and it therefore cannot be said to be an abuse of discretion to rule it admissible under Rule 404(b). Nor can we see any reason to disturb the ruling that the evidence was not unduly prejudicial. In addition to considering the prejudicial impact of the evidence before the trial, the trial judge delivered limiting instructions when the defendant's counsel so requested, warning the jury not to infer from the evidence of other crimes that Pipola was guilty

of the conspiracy, the robberies, or the firearms charges. *See* Fed. R. Evid. 105. In short, the district court's rulings under Rule 404(b) provide no basis for overturning Pipola's convictions.

CONCLUSION

Accordingly, for the reasons stated, the judgment of the district court is affirmed.